United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1903.

No. 1293. 211

ERNEST WILKINSON, COMPLAINANT, AND JOHN W. FROST, INTERVENOR, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MARCH 26, 1903.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1903.

No. 1293.

ERNEST WILKINSON, COMPLAINANT, AND JOHN W. FROST, INTERVENOR, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 30, 1903.

In the Court of Appeals of the District of Columbia.

ERNEST WILKINSON ET AL., Appellants,
vs.
THE DISTRICT OF COLUMBIA. } No. 1293.

a Supreme Court of the District of Columbia.

ERNEST WILKINSON, Complainant, and
John W. Frost, Intervener, Appellants,
vs.
THE DISTRICT OF COLUMBIA. } No. 23640. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill, &c.*

Filed December 1, 1902.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON
vs.
THE DISTRICT OF COLUMBIA. } In Equity. No. 23640.

The complainant states as follows:

1. The complainant is a resident of the District of Columbia, and sues in his own right.

2. The defendant is a municipal corporation, created under acts of Congress in force in the District of Columbia, and is sued in its own right.

3. That by deed dated on the ninth day of January, 1901, Charles C. Lancaster trustee then owner thereof, conveyed in fee to the complainant the following-described separate piece and parcel of real estate in the county of Washington, District of Columbia, known and distinguished as and being part of a tract of land covered by deeds recorded in Liber 1271 folio 292 and Liber 1906 folios 241 and 243 and Liber 2554 folio 47 of the land records of said District

and beginning at the junction of the west line of the Piney Branch road with the northern line of northernmost tract conveyed in said first-mentioned deed, thence north 62° 22′ west with the said northern line of said northernmost tract 312.53 feet, thence south 16° 37′ 30″ west 86.72 feet, thence south 56° 36′ east 287.23 feet to
2 the west line of the Piney Branch road, thence with the said west line north 32° 44′ 30″ east 114.44 feet to the beginning, containing 29,737 square feet, all bearings being true per city system.

And said deed, which is in the usual form, was recorded in Liber 2554 folio 154 *et seq.* one of the land records of the District of Columbia, which said piece and parcel of land was prior thereto a part of a tract of land containing 8.548 acres situate and lying on the east side of the proposed extention of 16th street and the west side of the Piney Branch road in the name- of Charles Early and Charles C. Lancaster, trustees, and your complainant is still the sole owner of said piece and parcel of land so conveyed and in possession thereof.

4. Thereafter, in the cause known as No. 580 in this court holding a special term as a district court, being a proceeding for the extension of 16th street extended, the jury of appraisers appointed by said court to award the damages and assess the benefits by reason of said extension filed their verdict in said court on May 29, 1901 awarding to Charles Early and Charles C. Lancaster, trustees for the condemnation of 4.646 acres the sum of $11,615 and assessing as benefits the sum of $2,137 on 8.548 acres in the name- of Charles Early and Charles C. Lancaster, trustees, being the same tract described in paragraph three of this bill.

The verdict of said jury was subsequently on the 19th day of June 1902 finally ratified and confirmed by the said district court.

5. Nearly four months prior to the filing of said verdict
3 containing said attempted assessment, the said tract of 8.548 acres had been conveyed of record by metes and bounds in sixteen separate and distinct pieces and parcels of land to your complainant and thirteen other persons, purchasers thereof.

These separate and distinct pieces and parcels of land were and are of varying acres, some front on the proposed 16th street extended and some on what is known as Piney Branch road, and the several pieces and parcels were and are of different values.

6. The said attempted assessment was made without reference to and in entire disregard of the aforesaid separate and distinct pieces and parcels of land which were of record nearly four months prior thereto and is attempted to be imposed on said tract of 8.548 acres as an entirety, as if it had not, as aforesaid, been conveyed in sixteen separate and distinct pieces and parcels of land, of which the said jury was legally required to take due notice prior to filing of their verdict.

7. The law under which said assessment was attempted to be made (act March 3, 1899, 30 Stats. 1344; act January 30, 1900, and act June 6, 1900, 31 Stats. 2, and 665) provided, that of the amount

found to be due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street, such amount thereof shall be assessed by the jury as benefits, and to the extent of such benefits against those pieces or parcels of land on each side of said Sixteenth street, and also on any or all pieces or par-
4 cels of land which will be benefited by the extension of said Sixteenth street, as said jury may find said pieces or parcels will be benefited, and in determining the amounts to be assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of Sixteenth street aforesaid.

But the jury failed and neglected to assess any amount as benefits against the aforesaid sixteen separate and distinct pieces or parcels of land of which complainant's is one but did attempt to assess as benefits the gross sum of $2,137 upon a tract of 8.548 acres in the name- of Charles Early and Charles C. Lancaster, which had, as aforesaid, been conveyed of record into sixteen separate and distinct pieces and parcels of land to fourteen separate purchasers.

8. The law further provides that when the verdict of the jury has been confirmed by the court, the several assessments provided to be made shall severally be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia, and shall be payable in four equal annual installments, with interest at the rate of four per centum per annum from the date of confirmation until paid.

The said attempted assessment has been entered upon the tax records of the said defendant as a lien of one sum of $2,137 on one tract of 8.548 acres, in the names of Charles Early and Charles C. Lancaster, trustees.

9. Thereafter, complainant desiring to obtain a loan upon his
5 said real estate, applied to the proper officer of the District of Columbia, for a certificate showing the unpaid taxes due upon his said lot. Whereupon the assessor of the District of Columbia issued his certificate of taxes on the aforesaid real estate, owned by complainant, containing sixty-eight one-hundredths of an acre and fronting on Piney Branch road, which certificate contained an official statement that taxes on said property were due and unpaid as follows:

"Taxes for year ending June 30, 1903, due and payable in May 1903.

Special Assessments.

Extension of 16th street, $2137.00, and interest from June 19th, 1902."

It will thus be seen that the official charged with the duty of certifying to unpaid taxes on behalf of defendant, has by his official cer-

tificate, attempted to charge the whole tax attempted to have been imposed on the said tract containing 8.548 acres, upon complainant's small fraction thereof, which does not even front upon 16th street as extended, and complainant submits that the invalidity of such action and of such attempts to claim a lien upon his property, is apparent in the light of what has hereinbefore been averred, but is not apparent upon inspection merely of said certificate.

10. Under the practice which now obtains in the District of Columbia, it is practically the universal custom for any one dealing with real estate, whether by purchase or loan, to require the certificate of said assessor showing the unpaid taxes, and in complainant's case,

no one will lend money upon his said real estate in view of
6 the said certificate and the illegal records in the custody of the said defendant, unless the whole of said alleged tax is paid.

11. Complainant charges that the aforesaid illegal records in the custody of the defendant and the tax certificate issued as aforesaid in respect of complainant's lot, casts a cloud upon the title and prevents him from having its free use and enjoyment, either by alienating or borrowing money upon it.

12. Complainant is advised and avers that the original attempted assessment of benefits, is void for the reasons hereinbefore set forth, which do not appear upon the face of the said tax records, that the defendant has no power to attempt to apportion the said charge upon complainant's land either by charging it as it has attempted to do, with the whole of the tax, or by arbitrarily attempting to charge it with some portion of the said tax. And not only is any apportionment of said assessment beyond the legal power of said defendant, but by reason of the facts hereinbefore set forth, no apportionment whatever can be legally or equitably made by the parties hereto.

13. Complainant has applied in writing to the defendant to cancel said attempted assessment and lien, and to remove the cloud upon his title, but said application has been refused.

Complainant therefore prays:

1. That the defendant may be perpetually enjoined from maintaining the alleged assessment as a charge upon its tax records against the property of this complainant.

7 2. That the defendant may be perpetually enjoined from reporting the said alleged assessment upon the tax certificates issued by it as a lien upon complainant's said property.

3. That the said alleged assessment may be decreed in so far as it is sought to be imposed upon complainant's said real estate, to be invalid and void.

4. That defendant may be decreed to cancel upon its tax records the said alleged assessment in so far as it relates to complainant's said real estate.

5. That complainant may have such further and other relief as the nature of his case may require.

To which end complainant prays for process of subpœna against

the defendant, requiring it to appear and answer the exigencies of this bill.

ERNEST WILKINSON.

C. C. LANCASTER,
JOHN RIDOUT,
Solicitors for Complainant.

I do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, that the facts therein stated as of my personal knowledge are true, and those therein stated on information and belief, I believe to be true.

ERNEST WILKINSON.

Subscribed and sworn to before me this 29th day of November, A. D. 1902.

RICHARD M. PARKER,
Notary Public, D. C.

[SEAL.]

8 *Petition.*

Filed January 28, 1903.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON
vs.
THE DISTRICT OF COLUMBIA. } In Equity. No. 23640.

The petition of John W. Frost, respectfully represents as follows:

1. The petitioner is a resident of the District of Columbia and sues in his own right.

2. The defendant is a municipal corporation created under the acts of Congress in force in the District of Columbia and is sued in its own right.

3. That by deed dated on the 9th day of January 1901, Charles C. Lancaster, trustee, then owner thereof, conveyed in fee to the complainant the following-described separate piece and parcel of real estate in the county of Washington, District of Columbia, known and distinguished as and being part of a tract of land conveyed by deeds recorded in Liber 1271, folio 292, and Liber 1902, folios 241 and 243, and Liber 2554, folio 47, of the land records of said District and described as follows:

Beginning at a point which will be on the east line of 16th street extended when the land for the extension of said street shall have been legally condemned and paid for, distant southerly 150.36 feet from the intersection of the east line of the said Sixteenth street when extended as aforesaid, with the north line of the norther-most tract described in said first-mentioned deed, thence south
9 89° 55′ east 285.19 feet, thence north 16° 37′ 30″ east 1.29 feet to the northern boundary of the said northernmost tract

covered by said deeds, thence with said line north 62° 22′ west 322.03 feet to what will be the east line of Sixteenth street extended when the land for the extension of said street shall have been legally condemned and paid for, thence with said east line south °0 05′ west 150.36 feet to the beginning, containing 21,619 square feet or 18,291 square feet exclusive of the triangular portion of the north end of the herein-described lot included within a proposed street of the amended hoghway-extension plan section 1, all bearings being true per city system.

A plat showing the said sixteen parcels, including complainant's is filed herewith and made part hereof as Exhibit 1.

4. And said deed, which is in the usual form, was recorded in Liber 2554, folio 154, *et seq.*, one of the land records of the District of Columbia, which said piece and parcel of land was, prior thereto, a part of a tract of land containing 8.548 acres situate and lying on the east side of the proposed extension of 16th street, and the west side of the Piney Branch road in the name- of Charles Early and Charles C. Lancaster trustees, and your complainant is still the sole owner of said piece and parcel of land so conveyed and in possession thereof.

5. Thereafter, in the cause known as No. 580, in this court holding a special term as a district court, being a proceeding for the extension of 16th street extended, the jury of appraisers appointed
10 by said court to award the damages and assess the benefits by reason of said extension, filed their verdict in said court on May 29th, 1901, awarding to Charles Early and Charles C. Lancaster trustees for the condemnation of 4.646 acres, the sum of $11,615, and assessing as benefits the sum of $2,137 on 8.548 acres in the name- of Charles Early and Charles C. Lancaster, trustees, being the same tract described in paragraph 3 of this bill.

The verdict of said jury was subsequently on the 19th day of June 1902, finally ratified and confirmed by the said district court.

6. Nearly four months prior to the filing of said verdict containing said attempted assessment, the said tract of 8.548 acres had been conveyed of record by metes and bounds in sixteen separate and distinct pieces and parcels of land to your complainant and thirteen other persons, purchasers thereof.

These separate and distinct pieces and parcels of land were and are, of varying acres, some front on the proposed 16th street extended, and some on what is known as Piney Branch road, and the several pieces and parcels were and are of different values.

7. The said attempted assessment was made without reference to and in entire disregard of the aforesaid separate and distinct pieces and parcels of land which were of record nearly four months prior thereto and is attempted to be imposed on said tract of 8.548 acres as an entirety, as if it had not, as aforesaid, been conveyed in sixteen separate and distinct pieces and parcels of land, of which the said jury was legally required to take due notice prior to filing of their verdict.

11 8. The law under which said assessment was attempted to be made (act March 3, 1899, 30 Stats., 1344; act Jan. 30, 1900,

and act June 6, 1900, 31 Stats., 2 and 655), provided that of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street, such amount thereof shall be assessed by the jury as benefits, and to the extent of such benefits against those pieces or parcels of land on each side of said 16th street, and also on any or all pieces or parcels of land which will be benefited by the extension of said 16th street, as said jury may find said pieces or parcels will be benefited and in determining the amounts to be assessed against said pieces or parcels of land, the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive from the extension of 16th street aforesaid.

But the jury failed and neglected to assess any amount as benefits against the aforesaid sixteen separate and distinct pieces or parcels of land of which the complainant's is one, but did attempt to assess as benefits the gross sum of $2,137 upon a tract of 8.548 acres in the name- of Charles Early and Charles C. Lancaster which had, as aforesaid, been conveyed of record into sixteen separate and distinct pieces and parcels of land to fourteen separate purchasers.

9. The law further provides that when the verdict of the jury has been confirmed by the court, the several assessments provided to be made shall severally be a lien upon the land assessed, and shall be collected as special-improvement taxes in the District of
12 Columbia, and shall be payable in four equal annual installments, with interest at the rate of four per centum per annum from the date of confirmation until paid.

The said attempted assessment has been entered upon the tax records of the said defendant as the lien of one sum of $2,137, on one tract of 8.548 acres, in the name- of Charles Early and Charles C. Lancaster, trustees.

10. Complainant has recently applied to the proper officer of the District of Columbia for a certificate showing the unpaid taxes due upon his said lot. Whereupon the assessor of the District of Columbia, he being the officer charged with that duty, issued his certificate of taxes on the aforesaid real estate owned by complainant containing fifty-one hundredths of an acre and fronting on 16th street extended, which certificate contained an official statement that taxes on said property were due and unpaid as follows:

Taxes for year ending June 30, 1903, due and payable in May, 1903.

Special Assessments.

Extension of 16th street, $2,137.00, and interest from June 19, 1902.

It will thus be seen that the official charged with the duty of certifying to unpaid taxes on behalf of defendant, has by his official certificate, attempted to charge the whole tax attempted to have been imposed on the said tract containing 8.548 acres, upon complainant's small fraction thereof and complainant submits that the invalidity of such action and of such attempts to claim a lien upon

his property, is apparent in the light of what has hereinbefore been averred but is not apparent upon inspection merely of said certificate.

13 11. Under the practice which now obtains in the District of Columbia, it is practically the universal custom for any one dealing with real estate, whether by purchase or loan, to require the certificate of said assessor showing the unpaid taxes, and in complainant's case, no one will lend money upon his said real estate in view of the said certificate and the illegal records in the custody of the said defendant, unless the whole of said alleged tax is paid.

12. Complainant charges that the aforesaid illegal records in the custody of the defendant and the tax certificate issued as aforesaid in respect of complainant's lot, casts a cloud upon the title and prevents him from having its free use and enjoyment, either by alienating or borrowing money upon it.

13. Complainant is advised and avers that the original attempted assessment of benefits, is void for the reasons hereinbefore set forth, which do not appear upon the face of the said tax records, that the defendant has no power to attempt to apportion the said charge upon complainant's land either by charging it as it has attempted to do, with the whole of the tax, or by arbitrarily attempting to charge it with some portion of the said tax. And not only is any apportionment of said assessment beyond the legal power of said defendant, but by reason of the facts hereinbefore set forth, no apportionment whatever can be legally or equitably made by the parties hereto.

14. Complainant is advised that his case, being similar to that of the complainant herein, he is entitled by leave of the court to intervene in this suit and become a co-complainant therein.

14 Petitioner therefore prays:—

1. That he may be allowed to become a party to this cause and a co-complainant therein, and that this petition may stand as his bill of complaint herein.

2. That the defendant may be perpetually enjoined from reporting the said alleged assessment upon tax certificates issued by it as a lien upon petitioner's said property.

3. That the said alleged assessment may be decreed in so far as it is sought to be imposed upon petitioner's said real estate, to be invalid and void.

4. That defendant be decreed to cancel upon its tax records, the said alleged assessment in so far as it relates to petitioner's said real estate.

5. That petitioner may have such further and other relief as the nature of his case may require.

To which end petitioner prays for process of subpœna against the defendant, requiring it to appear and answer to the exigencies of this bill.

JOHN W. FROST.

C. C. LANCASTER,
JOHN RIDOUT,
Solicitors for Complainant.

I do solemnly swear that I have read the foregoing bill by me subscribed and know the contents thereof, that the facts therein stated as of my personal knowledge are true, and those therein stated on information and belief, I believe to be true.

JOHN W. FROST.

Subscribed and sworn to before me this 27th day of January, A. D. 1903.

[SEAL.]

J. T. DYER,
Notary Public.

15 In the Supreme Court of the District of Columbia.

ERNEST WILKINSON, JAMES W. FROST, Intervenor,
vs.
THE DISTRICT OF COLUMBIA.
} In Equity. No. 23640.

In this cause it is stipulated that the bill and the intervening petition of said Frost may be and they are hereby amended at the hearing so that in paragraph 4 of the bill and paragraph 5 of said petition, line three after the words "16th St. extended" the following shall be inserted, "begun by filing a petition on Aug. 21, 1900 in which petition publication was made and notice was served in November, 1900, the jury was impanneled and viewed the property on Jan. 4th, 1901, and began the taking of testimony Jan. 4th, 1901."

That at the end of paragraph 5 of the bill and of paragraph 6 of the petition there shall be added the following words, "and these facts were proved on the hearing of the said condemnation proceedings by the jury."

That the demurrer interposed herein shall be deemed and taken to apply to the bill and the intervening petition as so amended.

CHAS. C. LANCASTER,
JOHN RIDOUT,
Solicitors for Complainant and Intervenor.
ARTHUR H. O'CONNOR,
Solicitor for Defendant.

Let these amendments be made as stipulated.

A. B. HAGNER, *Justice.*

16 *Demurrer.*

Filed December 26, 1902.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON
vs.
THE DISTRICT OF COLUMBIA. } Equity. No. 23640.

The defendant, The District of Columbia, says that the complainant has not stated in his bill of complaint filed herein such a case as entitles him to the relief therein prayed, or to any other relief against the defendant. Wherefore, the defendant demands the judgment of the court, whether it shall make further answer to said bill, and prays to be hence dismissed with its costs.

THE DISTRICT OF COLUMBIA,
By A. B. DUVALL,
ARTHUR H. O'CONNOR,
Its Attorney-.

DISTRICT OF COLUMBIA, *ss :*

Personally appears Henry B. F. MacFarland, who, being duly sworn says: That he is the president of the Board of Commissioners of the District of Columbia ; that he has read the foregoing demurrer and that the same is not interposed for delay.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me this 24th day of December, A. D. 1902.

[SEAL.] WILLIAM TINDALL,
Notary Public, D. C.

17 We hereby certify that the foregoing demurrer is well founded in law, in our opinion.

A. B. DUVALL,
ARTHUR H. O'CONNOR,
Attorneys for Defendant.

Decree Sustaining Demurrer.

Filed March 11, 1903.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON, Complainant,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } In Equity. No. 23640.

This cause coming on for hearing upon the demurrer of the defendant to the original bill and the intervening petition of John W.

Frost, as amended at the hearing, and having been argued by counsel for complainant and defendant and duly considered by the court; it is this 11th day of March, A. D. 1903, by the court, adjudged, ordered, and decreed that the demurrers of the defendant be, and the same hereby are sustained; and the complainant and the intervening petitioner electing to stand upon their bill and petition, respectively, as amended as aforesaid, it is further adjudged, ordered and decreed that the said bill of complaint and said petition, as amended be, and the same hereby are dismissed, and that
18 the defendant have its proper costs.

A. B. HAGNER,
Asso. Justice.

Order for Appeal & Citation.

Filed March 14, 1903.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON, Complainant; JOHN W. FROST, Intervenor,
vs.
THE DISTRICT OF COLUMBIA.
} In Equity. No. 23640.

The complainant and intervenor appeal to the Court of Appeals from the decree in this cause and the clerk will issue citation with said Wilkinson and Frost as appellants and The District of Columbia as appellee.

CHAS. C. LANCASTER,
JOHN RIDOUT,
Solicitors for Complainant and Intervenor.

19 In the Supreme Court of the District of Columbia.

ERNEST WILKINSON
vs.
THE DISTRICT OF COLUMBIA.
} No. 23640. In Equity.

The President of the United States to the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 14th day of March, 1903, wherein Ernest Wilkinson, complainant, and John W. Frost, intervener, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 14th day of March, in the year of our Lord one thousand nine hundred and three.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 17th day of March, 1903.

ARTHUR H. O'CONNOR,
Attorney for Appellee.

20 *Order Fixing Bond.*

Filed March 16, 1903.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON ET AL.
vs.
THE DISTRICT OF COLUMBIA. } In Equity. No. 23640, Doc. 53.

Upon consideration of the motion of the complainant and intervenor that the penalty of the bond for costs be fixed, it is this 16th day of March, 1903, ordered that the penalty of the bond for costs or the deposit in lieu of bond on the appeal herein, is hereby fixed at $50.

A. B. HAGNER,
Asso. Justice.

I consent.

ARTHUR H. O'CONNOR,
Solicitor for Def't.

Memorandum.

March 16, 1903.—$50 deposited by complainant in lieu of appeal bond.

21 *Directions to Clerk for Preparation of Record.*

Filed March 17, 1903.

In the Supreme Court of the District of Columbia.

ERNEST WILKINSON ET AL.
vs.
THE DISTRICT OF COLUMBIA. } Equity. No. 23640.

The clerk will please include the following in the transcript of record:
Bill & stipulation.
Petition of Frost; order thereon.
Demurrer.
Decree.
Appeal.
Order fixing deposit.
Citation.

JNO. RIDOUT.

22 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 21, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 23640, in equity, wherein Ernest Wilkinson *et al.* are complainants, and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19″ day of March, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1293. Ernest Wilkinson *et al.*, appellants, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Mar. 26, 1903. Robert Willett, clerk.

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

No. 1293.

ERNEST WILKINSON ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

CHARLES C. LANCASTER,
JOHN RIDOUT,
Solicitors for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 6824

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

No. 1293.

ERNEST WILKINSON ET AL., APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS.

STATEMENT OF THE FACTS.

This was a bill filed by the complainant, Ernest Wilkinson, in a suit in equity in the supreme court of the District of Columbia, in which suit the appellant, John W. Frost, was allowed to intervene.

The facts relied on by the complainant are that by deeds dated January 9, 1901, Charles C. Lancaster, trustee, then the owner, conveyed in fee to said Wilkinson a parcel of land containing 29,737 square feet, being .68 acre, fronting on the west line of what is known as the Piney Branch road, and to the appellant Frost a parcel of land containing 21,619

square feet, being .50 acre, and fronting on the east line of Sixteenth street extended. These deeds were duly recorded on the 29th day of January, 1901.

Thereafter, in a cause in the said supreme court, sitting as a District court, instituted as an extension of Sixteenth street, a jury of appraisers was appointed, and on May 29, 1901, filed an award, allowing to said Lancaster, trustee, who had succeeded Charles Early and Charles C. Lancaster as trustees, the sum of $11,615 as compensation for 4.646 acres in Sixteenth street extended, and assessed as benefits on the remainder of the tract, lying on the east side of Sixteenth street, which contained 8.548 acres, the sum of $2,137, such assessment being made in the name of Charles Early and Charles C. Lancaster, trustees. The verdict of the jury was finally ratified and confirmed on the 19th of June, 1902.

The proceedings for the extension of Sixteenth street were begun by filing a petition on August 21, 1900, in which petition publication was made and notice was served in November, 1900; the jury was impanneled and viewed the property on January 4, 1901, and began the taking of testimony January 4, 1901.

Nearly four months prior to the filing of the verdict said tract of 8.548 acres, on which said attempted assessment for benefits was made, had been conveyed of record by metes and bounds, in sixteen separate and distinct pieces or parcels of land, to the appellants, Wilkinson and Frost, and twelve other persons, purchasers thereof, as shown by official plat on file in the office of the Commissioners of the District of Columbia.

These separate and distinct parcels of land were and are of varying areas, some fronting on Sixteenth street extended

and some on Piney Branch road, and the several parcels were and are of different values. These facts were proven on the hearing of the said condemnation proceedings by the jury.

The said attempted assessment was made without reference to and in entire disregard of the aforesaid separate and distinct pieces and parcels of land which were of record nearly four months prior thereto, and which is attempted to be imposed on said tract of 8.548 acres as an entirety as if it had not been, as aforesaid, conveyed of record in sixteen separate and distinct pieces and parcels of land.

The jury failed to assess benefits against the said sixteen separate and distinct pieces and parcels of land severally and specifically, but attempted to assess as benefits the gross sum of $2,137 upon a tract of land containing 8.548 acres in the names of Charles Early and Charles C. Lancaster, trustees, and the jury made no attempt to and did not segregate and ascertain the respective benefits accruing to each of said sixteen parcels, but made their assessment in a lump sum upon the whole tract, as if it had never been divided and owned in separate and distinct pieces and parcels.

The attempted assessment has been entered upon the tax records of the District of Columbia as a lien of one sum of $2,137 on one tract of 8.548 acres, in the names of Charles Early and Charles C. Lancaster, trustees.

Thereafter the appellants, desiring to obtain a loan upon their respective parcels of said real estate, applied to the proper officer of the District of Columbia for tax certificates showing the unpaid taxes due upon their respective lots; whereupon the tax assessor of the District of Columbia issued his certificate on the aforesaid parcels of real estate owned

by the respective appellants, which certificates, among other things, showed, under the head of special assessments as an unpaid tax against each lot, the following: "Extension of 16th street, $2,137.00 and interest from June 19, 1902."

The assessor officially certified that the whole tax of $2,137 is a lien upon each of the parcels of land owned by the appellants, although each of said parcels is but a small fraction of the whole tract sought to be subjected to the tax, and the said amount is charged upon each of the two lots owned by the appellants, although one fronts on Piney Branch road, and is thus much less benefited than the other, which fronts upon Sixteenth street extended.

Under the practice among conveyancers in the District of Columbia, it is the universal custom to require the production of a tax certificate when any transaction relating to real estate occurs, and the effect of the action of the authorities of the District in thus issuing tax certificates, charging the whole of said tax on each of the parcels owned by the appellants, is to cloud their respective titles and prevents each of them from having the benefit and enjoyment of his property, either by alienation or by obtaining a loan upon it.

Because of the different values of these parcels, it is absolutely impossible to apportion the benefits among them by any rule or method, and there is no power on the part of any one of the owners to compel an apportionment as between himself and owners of other parcels affected by this tax.

The appellants have applied to the appellee to cancel said attempted assessment and lien and to remove the clouds upon their respective titles, but their applications have been refused.

After the bill and intervening petition had been filed, a demurrer was interposed by the appellee. The cause was heard upon the demurrer, which was sustained, and the appellants, electing to stand on their bill and petition respectively as amended, the bill was dismissed, and from that decree this appeal is prosecuted.

ASSIGNMENTS OF ERROR.

The court below erred as follows: First, in entering a decree dismissing the bill; second, in not holding that the attempted assessment for benefits was illegal and void; third, in not decreeing, in accordance with the prayer of the bill and intervening petition, that the said alleged assessment was, as against the parcels of land owned by the appellants, invalid and void.

ARGUMENT.

The facts in the record show conclusively that the tract of 8.548 acres, lying on the east side of Sixteenth street extended, had been subdivided and conveyed, January 9, 1901, by metes and bounds, into sixteen separate and distinct pieces and parcels of land, to fourteen different purchasers by recorded deeds; that these pieces and parcels of land were of varying areas, some fronting on Sixteenth street extended and some on Piney Branch road, and the several pieces and parcels of land were of different values, and that these facts were proven before the jury and known to them nearly four months before they filed their verdict in the district court.

Upon these admitted facts it was the legal duty of the

jury to assess separately benefits, if any, upon each of the sixteen separate and distinct pieces and parcels of lands as shown by the proof before them and the records of the recorder of deeds.

The statutes governing the jury in the premises are as follows:

Act of March 3, 1899, 30 Stats., 1344.
Act of January 30, 1900, 31 Stats., 2.
Act of June 6, 1900, 31 Stats., 666.

Section 2 of the act of March 3, 1899, provides:

"That of the amount found due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street as in this section provided, not less than one-half thereof shall be assessed by said jury in said proceedings against *those pieces and parcels of ground* situated and lying on each side of said Sixteenth street northwest between Morris street and the Piney Branch road and between the Blagden Mill road and the Military road, to a depth of two hundred and fifty feet, measured on each side from the building lines of the said Sixteenth street as extended."

Section 7 of said act provides:

"That the sums to be assessed against *each lot and piece and parcel of ground* shall be determined and designated by the jury, and in determining what amount shall be assessed against *any particular piece or parcel* of ground, the jury shall take into consideration the *situation of said lots*, and *the benefits they may severally receive* from the opening of said streets."

Section 1 of the act of January 30, 1900, provides:

"That of the amount found due and awarded as damages for and in respect of the land condemned for the extension of Sixteenth street, as in this section provided, not less than

one-half thereof shall be assessed by said jury in said proceedings against *those pieces or parcels of ground* situated and lying on each side of said Sixteenth street northwest between Morris street and the Blagden subdivision, and between the Blagden Mill road and the Rock Creek or Milkhouse Ford road, and between lots seven, four, and eleven of A. R. Shepherd's subdivision, to the depth of two hundred and fifty feet, or *to such greater depths as the benefits may be found by said jury to extend*, measured on each side thereof from the building lines of said Sixteenth street as extended."

Section 2 of the act of June 6, 1900, provides:

"That of the amount found to be due and awarded as damages for and in respect of the land condemned for the extension of Columbia road as herein provided, such amount thereof shall be assessed by the jury hereinafter provided as benefits, and *to the extent of such benefits against those pieces or parcels of land* on each side of said Columbia road as extended through block twenty-three of Columbia Heights, and also on *any or all pieces or parcels of land which will be benefited* by the extension of said Columbia road *as said jury may find said pieces or parcels of land will be benefited;* and in determining the amounts to be assessed against said pieces or parcels of land *the jury shall take into consideration the respective situations of such pieces or parcels of land and the benefits they may severally receive* from the extension of Columbia road as aforesaid."

Section 4 of said act provides:

"When the hearing is concluded the jury, or a majority of them, shall return to said court, in writing, its verdict of the amount to be found due and payable as damages sustained by reason of the extension of said street under the provisions thereof, and *of the pieces or parcels of land benefited by such extension*, and *the amount of the assessment for such benefits against the same.*"

The last two sections are made applicable to Sixteenth street by section 12 of said act.

The requirement to assess each piece or parcel of land separately was mandatory on the jury.

The above statutes provide that the jury shall assess each piece or parcel of land benefited by said extension, and it was the duty of the jury in this case to assess the benefits on each piece or parcel of land owned by the appellants. The record shows that the jury had full notice nearly four months before they filed their verdict that the tract of 8.548 acres had been conveyed into sixteen separate pieces or parcels of land, and that the deeds had been recorded. These pieces or parcels of land were just as much separate and distinct pieces and parcels of land nearly four months before the jury filed their verdict as any other pieces or parcels of land on Sixteenth street extended, and under the statutes above cited it was the duty of the jury to determine and assess the benefits on said pieces or parcels of land.

"What the statute expressly commands, the courts hold necessary to be done. An entire failure or omission to perform a jurisdictional act, it is scarcely necessary to add, will be fatal to every assessment affected thereby."

Welty on Assessment, section 220.

"It only remains to be added that, in making assessments for street and other local improvements, made at the cost of the adjoining property benefited, and the cost of which constitutes a lien upon the property liable therefor, separate assessments of separate lots or parcels becomes mandatory."

Welty on Assessment, section 311.

"When the acts to be done are for the benefit or protection of the property-owner or tax-payer they are mandatory."

Welty on Assessment, section 319.

Bauman *vs.* Ross, 167 U. S., 591.

Lots must be assessed separately.

Welty on Assessment, sections 110, 111, and authorities cited.

"Lots must be separately assessed in order to create a lien upon them, though they may be all under the same ownership."

Am. and Eng. Encyc. of Law, 1 ed., vol. 10, p. 299, 300, and authorities cited.

The doctrine of *lis pendens* does not apply in tax or condemnation proceedings.

Bennett on *Lis Pendens*, sections 88, 89, and 179.

The doctrine does not apply in this case for the following reasons:

(*a*) The appellants were legally bound to take notice of the proceedings for the extension of Sixteenth street.

(*b*) The appellants and their property were before the jury nearly four months before said jury filed its verdict.

In Wight *vs.* Davidson, 181 U. S., 382, the Supreme Court announced the following principle of law applicable to cases of this kind:

"It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the supreme court of the District, gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently

be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel."

Parsons *vs.* D. C., 170 U. S., 51.
Bauman *vs.* Ross, 167 U. S., 584.

The record in this case shows that the appellants and their property were before the jury nearly four months before the jury filed its verdict, and that they were original parties to the proceedings and legally entitled to have their separate and distinct pieces or parcels of land considered by the jury and by them assessed separately if the jury should determine that their separate pieces or parcels were benefited by said extension.

The lien for street assessments attaches at the time fixed by the statute, and subsequent purchasers are regarded as purchasers *pendente lite.*

Am. and Eng. Encyc. Law, 1 ed., vol. 24, p. 76.

By sections 8 of the act of March 3, 1899, and act of June 6, 1900, it is provided as follows:

"That when confirmed by the said court, the assessments shall severally be a lien upon the land assessed and shall be collected as special improvement taxes in the District of Columbia."

In this case the verdict of the jury was not finally ratified and confirmed by the district court until June 19, 1902.

Therefore the appellants were not purchasers *pendente lite,* for they had purchased and their deeds recorded nearly eighteen months prior to the attachment of the lien.

Lyon *vs.* Alley, 130 U. S., 189.

From the foregoing it clearly appears that the illegal action of the Commissioners of the District of Columbia in charging the whole of the assessment upon each of the appellants' lots casts a cloud upon the title thereto which the appellants are entitled to have removed by a decree in equity.

The decree below was therefore wrong and should be reversed.

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Solicitors for Appellants.

Court of Appeals, District of Columbia.

APRIL TERM, 1903.

No. 1293.

ERNEST WILKINSON, COMPLAINANT, AND JOHN W. FROST, INTERVENOR, APPELLANTS,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR THE DISTRICT OF COLUMBIA.

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BRIEF AND ARGUMENT FOR THE DISTRICT OF COLUMBIA.

STATEMENT OF FACTS.

This case was heard and determined in the lower court upon the demurrer of the appellees to the bill and petition of the appellants.

The bill of complaint filed by appellant Wilkinson involved the validity of an assessment by the jury of condemnation in the matter of the extension of Sixteenth street N. W. (No. 580, District court).

The laws under which those proceedings were instituted and prosecuted followed the usual policy of the street-extension laws for the District of Columbia, and authorized the jury not only to make an allowance by way of award for land taken, but to also make an assessment measured by

benefits upon land within an assessment area prescribed by the act authorizing the proceeding.

The proceeding in the matter of the extension of Sixteenth street was governed by three separate acts of Congress, as noted upon page 6 of appellants' brief.

A brief explanation of the purposes of the three separate acts may not be improper. Under the act of March 3, 1899, the extension of Sixteenth street from Morris street to the District line (a distance of about six miles) was provided for, and the Commissioners of the District of Columbia were authorized and directed to institute proceedings within thirty days from the time that the land necessary for such extension between Piney Branch and Blagden Mill road, and also between the Military road and the District of Columbia boundary line, should be dedicated. Following the policy of the legislation at that time existing, the act directed that not less than one-half of the award for the land taken should be assessed against the land on each side of Sixteenth street to a depth of two hundred and fifty feet. This same act provided for the extension of Eleventh street, as well as "S," Twenty-second, and Decatur streets, and has been before the court in several cases arising out of the extension of those streets last named. Subsequently, the necessary amount of land not having been dedicated, the act of January 30, 1900, authorized the extension whenever 75 per centum of such land should be dedicated, and, as to assessments, retained the provision that not less than one-half should be assessed by the jury upon the assessment area, and at the same time changed the assessment district. Before proceedings were instituted this court had decided the case of Davidson *vs.* Wight *et al.*, which decision brought forth the legislation of 1900 and provided for the extension of Columbia road east of Thirteenth street. By the act of June 16, 1900, the policy

of the law was changed, requiring the jury to make assessments according to the benefits as they found them, and provided that the proceedings for the extension of Sixteenth street should be according to the provisions of that law.

Thereafter, on the 21st day of August, 1900, proceedings for the extension of Sixteenth street were instituted by filing a petition (No. 580, District court). Publication was made, and notice was served according to that act in November, 1900. A jury was impaneled and viewed the property on January 4, 1901, and began the taking of testimony upon the same day (Rec., p. 9, stipulation amending the bill and intervening petition).

The assessment sought to be set aside is, as stated on page 2 of appellants' brief, upon the tract of land containing 8.548 acres in the sum of $2,137, which tract of land is the remainder of a tract part of which (4.646 acres) was taken for the extension of the street, and for which Charles C. Lancaster, trustee, the successor of Charles Early and Charles C. Lancaster, trustees, was awarded the sum of $11,615.

The appellants claim their rights and standing in this case upon the deed from Lancaster, dated January 9, 1901, some six months after the proceedings were instituted and two months after publication of notice to all parties interested had been made, and about the same length of time after service required by the statute had been made.

Appellants allege in their bill and petition, respectively, that in the month of January, 1901, the tract of land upon which the assessment was made, the same being a part of the Early and Lancaster tract, was conveyed by metes and bounds in sixteen separate and distinct pieces and parcels of land to the appellants and twelve other purchasers thereof; that this fact was presented to the jury of condemnation while the case was on hearing before them. No claim is made that these appellants or any of the other grantees of

Lancaster, to whom conveyances had been made in January of portions of the tract of land assessed, had at any time during the proceedings in the case applied to become parties to the proceedings, or in anywise intervened as interested parties, nor is it claimed or alleged in any form that they did not have actual as well as constructive notice of the proceedings for the extension of Sixteenth street when they purchased from Lancaster in January, 1901.

The claim of appellants appears to be that because the jury were informed before the conclusion of the hearing that certain land embraced within the assessment district prescribed by the statute, and which was subject to assessment, had been conveyed by the person who owned the same at the time of the institution of the proceedings and at the time of the publication and service of notice of the proceedings, they, the jury, were obliged to follow the title and recognize any change or attempted change of title *pendente lite* and then apply the general rule of assessment that each piece or parcel of land should be separately assessed.

Upon these facts the court is asked to set aside the assessment because of the failure of the jury to assess each of these sixteen separate pieces of land separately, although at the institution of the proceedings and at the time of the publication and service of notice it was an entire tract of land owned by the grantor of the appellants; and upon the ground that there is now no power in the appellee to apportion said assessment amongst the several pieces or parcels of land, according to the conveyances made in January, 1901.

ARGUMENT.

It is claimed by the appellants that because the statute under which the proceedings for the extension of Sixteenth street were had provided "that when confirmed by said court the assessments shall severally be a lien upon the land assessed and shall be collected as special improvement taxes in the District of Columbia," and because the verdict of the jury in that proceeding was not finally ratified and confirmed by the District court until June 19, 1902, that therefore the appellants were not purchasers *pendente lite*, for they had purchased and their deeds were recorded nearly eighteen months prior to the attachment of the lien, and they cite as authority for that proposition Lyon *vs.* Alley, 120 U. S., 189.

This case, it is submitted, has no bearing upon the question and only maintains the well-recognized principle that in order to create a lien upon property an assessment must follow the statute.

The vice of this argument may be readily seen. If the authorities of the District of Columbia were attempting to enforce a lien upon the property before the confirmation of the verdict, without doubt that provision of law would prevent the assertion or enforcement of any lien before confirmation. Without regard to any lien upon the land by virtue of any assessment made by the jury, the question involved in this case is the question of jurisdiction of the court over the subject-matter of the proceeding. It is in the nature of a proceeding *in rem*. When the petition had been filed under the authority of the act of Congress and publication and service of notice had been made in accordance therewith, the supreme court of the District of Columbia, sitting as a district court, had complete jurisdiction over the whole subject-matter and was authorized to proceed with the con-

demnation of the land, and the assessment of benefits in accordance with the status of the land as it existed at that time. Every person interested in the land was from that time bound by the proceedings, and were properly before the court.

Wight *vs.* Davidson, 181 U. S., 282.
Parsons *vs.* D. C., 170 U. S., 51.

We submit that the doctrine of *lis pendens* came into operation, and every person purchasing any land subject to these proceedings took his title subject to any verdict or decree which might thereafter be rendered in the proceedings. That this doctrine applies to proceedings of this nature has been frequently held, as will hereafter be shown, and a case can hardly be imagined where the necessity of the doctrine is greater than here. The proceedings involved probably two hundred and fifty or three hundred separate pieces or parcels of land, and if the jury of condemnation were to attempt to follow the changes or attempted changes of title that might intervene between the commencement of the proceedings and their verdict, rendered months thereafter, the proceedings would never terminate, and still more would this be the fact if the land should be subject to change of title affecting these proceedings up to the time of confirmation of the verdict.

"Where the owner conveys, pending proceedings, the grantee takes subject to the proceedings."

Lewis, Eminent Domain, Sec. 338, citing Plumer *vs.* Wausau Boom Co., 49 Wis., 449.
Mills, Eminent Domain, Sec. 95.

"The underlying, if not the sole object of the maxim *pendente lite nihil innovetur*, is to keep the subject of the suit *or res* within the power of the court until the judgment or decree shall be entered, and thus to make it possible for

courts of justice to give effect to their judgments and decrees. The necessity of the rule for this object is manifest and its enforcement for that purpose imperative."

13 Enc. Law, 870, and cases cited in note 1.

"The reason for the law of *lis pendens* best supported by principle and sanctioned by authority, including those cases which deny that it is correctly termed a notice or results from any legal presumption that all persons have knowledge of court proceedings, is that the rule is essential, on grounds of public policy and necessity, to the due administration of justice. Otherwise, by successive alienations, litigation might be rendered interminable, courts prevented from enforcing their judgments or decrees and the adverse party precluded from reaping the fruits of success. *It is a rule to preserve the situation as it existed when the litigation was begun, in order that effect may be given to the rights ultimately established therein.*"

Lis pendens is, in fact, but one phase of the law of *res judicata.*

21 A. & E. Enc. Law, 2d ed., pp. 601–602.

Some of the leading cases on the subject are:

Newman *vs.* Chapman, 2 Rand. (Va.), 93.

Murray *vs.* Ballou, 1 Johns. Chan., 566.

Warren County *vs.* Marcy, 97 U. S., 96.

The Supreme Court of the United States, referring to the last case above cited, in Union Trust Co. of N. Y. *vs.* Southern Inland Navigation and Improvement Co., 130 U. S., 565, said:

"In County of Warren *vs.* Marcy, 97 U. S., 96, it was said to be a general rule that 'all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit.' * * * And in support of this view was cited the case of Murray *vs.* Ballou, 1 Johns.

Ch., 566, in which Chancellor Kent laid it down as an established rule that 'a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree;' and the *lis pendens* begins from the service of the subpœna after the bill is filed."

Chancellor Kent, in the case of Murray *vs.* Ballou, *supra*, after discussing the earlier English decisions, says:

"If we come down to more modern times, when the principles of equity may be supposed to have been more highly cultivated, and more precisely defined, we shall find the rule recognized with equal force. Thus in Sorrell *vs.* Carpenter (2 P. Wms., 482), the defendant purchased an estate, *pendente lite*, from one Ligo, after subpœna served on Ligo, and before answer, for the full value, and without any notice of the plaintiff's title or actual notice of the suit. This was the strongest case that could be imagined, and under circumstances far more favorable to the purchaser than the present; and Lord Ch. King said, that it was a very hard case to set the purchase aside, yet he admitted that such was the rule, and that it was taken from analogy to alienations pending real action at law. This doctrine came frequently under the view of Lord Hardwicke, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit. The pendency of the suit was, of itself, notice; and he observed, that the rule was to prevent a greater mischief that would arise by people's purchasing a right under litigation (Garth *vs.* Ward, 2 Atk., 174; Worsley *vs.* Scarborough, 3 Atk., 392). Lord Camden afterwards enforced the same rule. 'I hold it,' he said, 'as a general rule that an alienation pending a suit is void' (Walker *vs.* Smallwood, Amb., 676). I shall conclude this view of the English authorities with noticing the observations of the master of the rolls in the case of the Bishop of Winchester *vs.* Paine (11 Ves., 194). 'He who purchases during the pendency of the suit is bound,' says Sir William Grant, 'by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As

to them it is as if no such title existed. Otherwise, suits would be interminable, or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined. The rule may sometimes operate with hardship, but general convenience requires it.'

"It would be impossible, as I apprehend, to mention any rule of law which has been established upon higher authority or with a more uniform sanction; and I should have thought it necessary to apologize for wasting so much time on the point, if I had not found the rule, ancient and stable as it is, questioned and resisted by plausible considerations addressed to the feelings."

The doctrine of *lis pendens* applies to suits in law and equity.

21 A. & E. Enc. Law, 2d ed., 601.

It applies to divorce suits and suits for alimony.

13 A. & E. Enc. Law, 800.

And to bankruptcy proceedings.

Ib., 84.

It applies to condemnation proceedings.

21 A. & E. Enc. Law, 2d ed., 664.

Plumer *vs.* Boom Co., 49 Wis., 449.

Schriver *vs.* C. E. Railway, 115 N. Y., 345.

C. E. & L. S. Railway *vs.* Catholic Bishop of Chicago, 119 Ill., 532.

Shirk *vs.* Whitten, 141 Ind., 455.

Hartley *vs.* Keokuk, etc., R'y Co., 85 Iowa, 455, at 466.

Appellants in their behalf cite to the contrary Bennett on Lis Pendens, §§ 88, 89, and 179.

Upon examination of the authority cited by counsel for appellants it will be found that sections 88 and 89, instead

of asserting that the doctrine of *lis pendens* will not apply to proceedings for condemnations, merely assert that the doctrine of *lis pendens* will not prevail against the imposition of taxes nor proceedings for the condemnation of property, and are in effect against the proposition of appellants.

Section 179, while making the general assertion that a proceeding for condemnation is not *lis pendens*, no authority is cited in support of the text, and it is directly against the authorities above cited.

Purchasers *pendente lite* act at their peril and are not necessary parties to the suit.

15 A. & E. Enc. Law, 900.

Kern *vs.* Hazelrigg, 11 Ind., 446.

They may be admitted parties in the discretion of the court, but cannot demand that right, and they are bound by the decree of the court.

Mellon *vs.* Moulin Iron Works, 131 U. S., 352.

Where a foreclosure suit had been instituted and pending the litigation the defendant had become a bankrupt and his assignee had filed a certificate of his appointment as assignee in the foreclosure case, it was held by the Supreme Court of the United States that the court having jurisdiction of the foreclosure suit could not take judicial notice of the proceedings in bankruptcy, and that the mere filing in the court of his certificate of appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention; and, moreover, it was the duty of the court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. The opinion was delivered by Mr. Justice Miller, in which he uses the following language:

"The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of the parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, and until by some proper pleading in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain, that if at any stage of the proceeding, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none."

Eyster *vs.* Gaff, 91 U. S., 521.

It will be observed that the appellants do not claim that they were without notice of the proceedings when they purchased the property, and not having affirmatively alleged in their bill and petition respectively the want of actual notice, they will be presumed to have had notice.

Murray *vs.* Ballou, 1 Johns. Chan., 566.

Heatley *vs.* Finster, 2 Johns. Chan., 158.

Murray *vs.* Finster, 2 Johns. Chan., 155.

A purchaser with actual notice is guilty of collusion and fraud, and to relieve him of this charge his bill should show affirmatively want of notice.

Ibid.

While it may be admitted to be a sound general principle that assessments should be levied upon each separate piece or parcel of land independently, this only applies to the status of the land as it existed at the time the court acquired jurisdiction over it. To hold otherwise would lead to interminable litigation. So it is held in the case of Mellon *vs.* Moulin Iron Works, above cited, and in this case the court also held that though purchasers *pendente lite* may, in the discretion of the court, be admitted as parties, they cannot demand that right, and that they are bound by the decree of the court.

In the case at bar neither of the complainants asked the right to be made parties, and, having no interest in the property at the time of the institution of the proceedings or at the time of the publication and service of notice, they could not become parties otherwise than by order of the court.

The appellants have shown neither an equitable nor a legal title to maintain this suit.

It is not even a case of hardship, such as are the cases cited by Chancellor Kent in the case of Murray *vs.* Ballou, *supra.*

The appellants are presumed to have bought with actual notice. They had every opportunity to protect themselves, and it is not a violent presumption of fact that they did so protect themselves, against any charge for assessment upon this land at the time they purchased.

We therefore respectfully submit that the court below committed no error in sustaining the demurrer, and that the decree should be affirmed.

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